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Multiplayer games: tax, copyright, consumers and the video game industries

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ABSTRACT

The successes of the games industry requires an analysis of the way in which the state is influencing, or attempting to influence, the development of the sector. Drawing from a research project on games, transmedia and the law, including a roundtable with developers and others from the industry, a critical perspective is provided on the impact of three types of law (tax, consumer and intellectual property) on the UK industry. The negotiation and eventual approval of a tax credit for video game development expenditure is reviewed. This is an example of the games industry lobbying for and welcoming the creation of a specific (but film-influenced) legal status for the ‘video game’ – but the passage of the scheme raises troubling questions about the cultural status of games. A significant commercial issue, that of consumer protection, is then discussed. Consumer legislation may prove to constrain certain developments in relation to games; it is argued that there is a special impact on new platforms, because of the (deserved) official attention now being paid to in-app purchases. In relation to intellectual property, the alignment (or misalignment) of copyright law with concepts of value in the sector is considered, with particular reference to ‘cloning’. In conclusion, the particular impact of the three fields on new platforms, and the different degrees to which legislation is contributing to the development of the games sector, is considered. It is argued that the emerging business model of F2P non-console games is not handled as well as it should be, particularly as compared with other business models in the sector.

INTRODUCTION¹

In 2012, it was reported that 40% of the UK population (aged 16-64) played a video game within the last year, with slightly more (29% of the population) having played an online game than a conventional packaged game played from a disc or similar medium (28%).² What the games

¹ This work was supported by the RCUK funded Centre for Copyright and New Business Models in the Creative Economy (CREATE), AHRC Grant Number AH/K000179/1. I am very grateful to co-investigator Dr. Keith M. Johnston and research associate Dr. Tom Phillips for their work on this project and their feedback on this article, and to the audience at a presentation of a draft of this article at the BILETA Annual Conference 2014 in Norwich for their interest and comments.

² IFSE, ‘Videogames in Europe: consumer study, United Kingdom’ (November 2012) http://www.isfe.eu/sites/isfe.eu/files/attachments/great_britain_-_isfe_consumer_study.pdf 4.

scholar Jesper Juul called a 'casual revolution',³ where video games of various types can be played on non-dedicated devices like smartphones and through web browsers, is clearly well underway. Games are a popular category within smartphone app stores,⁴ and despite concerns about copyright infringement disrupting established business models, it is still possible for launches of new software and hardware to draw crowds and queues in high street stores.⁵

Unsurprisingly, business models for the games industry are evolving. Seeking success through successive sequels⁶ or relying on popular characters and voiceovers⁷ remains a common strategy, but the developing category of casual games runs from artistic experiments to throwaway, mass-market products.⁸ There is a certain level of excitement regarding the impact of 'in-app purchases' in what are sometimes referred to as F2P (free to play) games,⁹ especially where the past obstacles to 'micropayments'¹⁰ have been overcome on platforms like the iPhone / iPad. This excitement is tempered by criticism on the grounds that some games are exploitative and/or unimaginative,¹¹ and a contention that today's iOS App Store is 'swamped with cash-juzzling junk, shameless knockoffs and predictable sequels',¹² but supporters point to a return to the 'joys and invention of the early days of game making'.¹³

The games industry is clearly one where great successes can be noted, and deserving of serious analysis. This article, with a focus on the United Kingdom, considers the way in which the state is influencing, or attempting to influence, the development of the video games sector. In the context of a research project on games, transmedia and the law, and studying both legal

³ J Juul, *A casual revolution* (MIT Press, 2010). Juul also discussed the rise in popularity of mimetic interfaces rather than the classic push-button controller, focusing on consoles like the Wii (of less interest for the purposes of this study); the touch interface of smartphones and tablets can be seen as a development of this component.

⁴ A 2014 report found that of the 'top grossing' apps, 84.9% were games: S Dredge, 'Clash of Clans and Candy Crush Saga dominate apps 'superstar economy' (discussing work by Midia Research, which is not publicly available) <http://www.theguardian.com/technology/2014/jul/08/clash-of-clans-candy-crush-saga-mobile-games-apps-economy>. See also D Mac Síthigh, 'App law within: rights and regulation in the smartphone age' (2013) 21 *International Journal of Law & Information Technology* 154, 181.

⁵ See for example S Boxer, 'Modern Warfare 3 seeks sales record' (*The Guardian – Games Blog* 9 November 2011) <http://www.theguardian.com/technology/gamesblog/2011/nov/09/modern-warfare-3-seeks-sales-record>; K Stuart & C Arthur, 'Wii U launch: make or break for Nintendo' (*The Guardian* 30 November 2012).

⁶ J Newman, *Videogames* (2nd edn Routledge, 2013) 47; Y H Lee, 'Play again? Revisiting the case for copyright protection of gameplay in videogames' (2012) 34 *European Intellectual Property Review* 865, 868 (noting that 8 of the top 10 games in 2011 were sequels or continuations).

⁷ J Gray, *Show sold separately* (NYU Press, 2010) 188.

⁸ ___, 'Loaded words' *Edge* (May 2013) 74-81, 80.

⁹ This model is discussed extensively in N Lovell, *The Curve: turning followers into superfans* (Penguin, rev ed 2014). He gives multiple examples in respect of games, including games on Facebook like Farmville (ibid, 119), or developers and publishers taking advantages of the ability to distribute free games without incurring costs through stores like the iOS App Store (ibid, 41).

¹⁰ Lack of infrastructure and disproportionate transaction charges, as outlined in C Reimsbach-Kounatze & S Wunsch-Vincent, 'Online games and virtual worlds: business and policy developments' in C Graber & M Burri-Nenova, *Governance of digital game environments and cultural diversity* (Edward Elgar, 2010) 27.

¹¹ See discussion in Newman, 36-7; Goldberg, *All your base are belong to us: how fifty years of videogames conquered pop culture* (Crown, 2011) 243, 251.

¹² ___, 'What happened to the iOS gaming revolution?' *Edge* (March 2014) 78-85, 79.

¹³ Goldberg, 198.

doctrines and industry discussions of these issues,¹⁴ I provide a critical perspective on the impact of three types of law (tax, consumer and intellectual property) on the UK industry.

The future shape of the games sector is, it will be contended, subject to a range of legal provisions. These go well beyond the best-known example of statutory control, the regulation of content, which will not be considered in this article.¹⁵ While a specific approach or business model is unlikely to be *required* or *prohibited* by legislation, features of tax law, consumer protection law and intellectual property law all *affect* (through constraining or encouraging particular actions) the opportunities for innovation in art and business in the games industry. These laws also shape the identity of games developers, making as they do assumptions about value, creativity and motivation.

The article draws upon some of the findings of a workshop attended by developers, broadcasters and others at the University of Edinburgh in December 2013.¹⁶ Substantial use is made of material from the long-established 'interactive entertainment' magazine *Edge*, chosen as it appears to be a publication with regular discussion of legal and business issues for an industry audience. Material in *Edge* therefore can be used to add context to the major legal and political developments, allowing the study of these matters in a wider context of industry reaction and debate.

In section A, the negotiation and eventual approval of a tax credit for video game development expenditure is reviewed. This is an example of the games industry lobbying for and welcoming the creation of a specific (but film-influenced) category for the 'video game' – but the passage of the scheme raises troubling questions about the cultural status of games. Section B considers another quintessentially commercial issue – that of consumer protection. In this case, the result of legislation may be to constrain certain developments in relation to games – and perhaps address the 'cash-guzzling junk' point noted above. It is argued that there is a special impact on new platforms, because of the (deserved) official attention now being paid to in-app purchases. Finally, questions of intellectual property law (primarily copyright, but also including the cross-cutting question of another alleged feature of new platforms, 'knockoffs') are considered in section C. The alignment (or misalignment) of copyright law with concepts of value in the sector is considered, and recent case law (including *Nintendo v PC Box* on technological protection measures or TPMs) is reviewed. I conclude by highlighting the particular impact of the three fields on new platforms, and assess the different degrees to which legislation is contributing to the development of the games sector.

SECTION A: TAX RELIEF

I. CONTEXT

Bodies representing the video game industry have called for a tax credit for game development

¹⁴ See <http://www.create.ac.uk/research-programme/theme-1/games-wple/>.

¹⁵ For further discussion see the analysis of the present author: D Mac Síthigh, 'The regulation of video games: past, present and future' (2010) 21 Entertainment Law Review 298.

¹⁶ Conducted under Chatham House rules (contributions not attributed to particular speakers). The workshop was chaired by the author, Dr. Keith M. Johnston and Dr. Tom Phillips, and attended by Brian Baglow, Chris Bruce, Ben Farrand, Yin Harn Lee, Nicoll Hunt, Rami Ismail, Ifty Khan, Rick Lane, Elaine Reynolds, and Matt Watkins.

for some time. In this section, I will assess aspects of this (ultimately successful) campaign. Initially, though, a brief explanation of creative industry tax credits more generally is necessary, in order to understand the nature of such a credit and the (policy) precedents that influenced the demands of the industry.

A film tax credit is currently in place in the UK; the present version dates from 2006. It was not, however, the first attempt to deal with the tax treatment of film production. The 2006 credit replaced an earlier form of relief, which had been the subject of complex arrangements for writing off the costs of production through (often lucrative) sale and leaseback arrangements, and had become discredited as a result.¹⁷ The film credit was, after some consideration, approved by the European Commission as compatible with the 'state aid' provisions of the Treaty on the Functioning of the European Union.¹⁸ It operates as an additional deduction for expenditure, possibly payable as a credit depending on the profit or loss of the project in question. As such, its characterisation as a State subsidy to private enterprise (in a particular sector and not available to all) is appropriate.¹⁹

Political parties promised the extension of the 2006 credit to the games sector in the 2010 general election. However, following the formation of the Coalition government, the new Chancellor did not put forward such a scheme. Instead, he found that the proposal was an example of a "poorly targeted" form of relief.²⁰ This drew criticism from representative bodies – not just comparing with other creative sectors, but comparing the position of development in the UK with the opportunities available in other jurisdictions.²¹ Canada was frequently cited. Within the UK, there was also a regional dimension. Around 25% of companies in the UK games industry are located in Scotland²² (where approximately 10% of the population lives). As such, an additional voice in the debate was the Scottish Affairs Committee of the House of Commons, which recommended that the question of tax relief be given further consideration.²³ Between the claims of private bodies and ongoing political interest, the case for favourable tax treatment for this industry continued to be put well after it appeared that it had been rejected by Government.

II. IMPLEMENTATION

In December 2012, a scheme for video game (and high-end TV, and animation) tax credits was announced. The scheme was modelled on that for film. There were two components to the

¹⁷ A Shipwright, 'Finance Act notes: films and sound recordings' (2006) 5 British Tax Rev 517; D Mac Sithigh, 'Principles for a second century of film legislation' (2014) 34 Legal Studies 609, 615.

¹⁸ European Commission, 'State aid: Commission approves UK video games tax relief plan' (IP/14/331), 27 March 2014.

¹⁹ See further C Graber, 'State aid for digital games and cultural diversity: a critical reflection in the light of EU and WTO law' in C Graber & M Burri-Nenova (eds), *Governance of digital game environments and cultural diversity* (Edward Elgar, 2010)

²⁰ Hansard HC vol 512 col 175 (22 June 2010); K Stuart, 'Budget 2010: video games tax relief disappears' (*Guardian* 22 June 2010) <http://www.theguardian.com/uk/2010/jun/22/budget-2010-video-games-tax-relief-disappears>.

²¹ K Stuart, 'Tiga, tax breaks and the future of the UK games industry' (*The Guardian – Games Blog* 10 October 2011) <http://www.theguardian.com/technology/gamesblog/2011/oct/10/tiga-richard-wilson-interview>.

²² House of Commons Scottish Affairs Committee, *Video games industry in Scotland* (2010-11) HC 500 [19].

²³ House of Commons Scottish Affairs Committee, *Video games industry in Scotland* (2010-11) HC 500 [50], [55-7].

implementation of the promise. The first was the amendment of the Finance Act, so as to provide for the tax treatment of video game development expenditure. The second was the setting up of a 'cultural test' which would determine eligibility for the credit. The design of tax scheme appears to distinguish between revenue at the point of sale and revenue from subsequent purchases;²⁴ this is of little relevance to the conventional sale of boxed games for consoles, but a significant matter for those using newer business models.

The amended Finance Act is where one might find the definition of a video game. However, no such definition is found. Supporting material confirms that it was the Government's intention that "video game" take its ordinary meaning.²⁵ However, having realised the consequences of this (and concerned about meeting the EU requirements discussed below), "anything produced for advertising or promotional purposes" and gambling are both explicitly excluded from the scheme.²⁶ There is of course the potential for abuse of this broad definition, although for the time being it is interesting to note how the price of state support for the industry includes some structures for 'deserving' and 'undeserving' being set out in legislation – a timely reminder that the industry is not autonomous as it might have been in its earlier days.

Having seen success in persuading the Government to put forward proposals for legislative change, there remained one further significant obstacle to the creation of the system for video game tax credits. That was the requirement for European Commission approval, which (as noted above) was also at issue when the template film scheme was adopted in 2006.

The Government put forward a similar points-based eligibility test – the 'cultural test' – for the games scheme. This test is necessary so as to ensure that the scheme promotes cultural objectives rather than protect national industries or distorts open markets within the European Union. Such measures would likely violate article 107(1) TFEU. However, the same article permits, subject to European Commission scrutiny, certain derogations from this general rule where culture is concerned. 'Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest' is appropriate, according to article 107(3)(d) TFEU.²⁷

Within the test, points are awarded for various features (e.g. setting, characters, subject matter, language, cultural contribution, the people involved, and support for cultural 'hubs'). A set number of points are needed, with some additional thresholds within sub-categories in place so as to avoid an inappropriate result.

The European Commission set out some of its doubts regarding the scheme in a letter of April 2013. It noted that a proposed rule on territory (whereby only spending on goods and services

²⁴ Corporation Tax Act 2009, s 1217AA (inserted by Finance Act 2013), defining completion of a game for the purposes of the scheme of tax credits as when the game "is first in a form in which it can reasonably be regarded as ready for copies of it to be made and made available to the general public".

²⁵ HM Treasury, 'Creative sector tax reliefs: response to consultation' (December 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190267/creative_sector_tax_reliefs_response11212.pdf [2.61].

²⁶ Corporation Tax 2000, s 1217AA (2) and (3), inserted by Finance Act 2013, sch 17. The significance of 'advergaming' and related genres is set out in J-M Lehu, *Branded entertainment* (Kolan Page, 2009) 179.

²⁷ Other exceptions, not relied on in this case, include aid of a social character, the development of underdeveloped regions, and (where not adversely affecting trading conditions) aid to facilitate the development of particular economic activities or areas.

used or consumed in the UK is eligible for relief) is specifically authorized in its own Cinema Communication, which sets down general principle for the review of national measures in this sector.²⁸ While the UK games scheme was modelled on the film scheme (which had been approved), that approval was in the context of the cinema-specific guidance.

The Commission also pointed to the fear of a ‘subsidy race’, noting the expressed desire of the UK Government to offer a scheme that is “among the most generous in the world”.²⁹ It also queried whether State aid was necessary in a growing market of this nature (as compared with, presumably, failing or declining markets where aid is deemed necessary to fill the gaps left by private investment or consumer payments).

This investigation was the subject of a lot of criticism from the UK industry.³⁰ This understandable frustration demonstrated a misunderstanding of the requirement of EU law; the fact that schemes in other jurisdictions or for other sectors had been approved could not realistically prevent Commission action, and the general presumption is against state aid (i.e. it is only in a minority of situations that it will be permitted, as an exception to the general rule that state aid to private industry is forbidden).

In any event, the final decision of the Commission was to allow the scheme to proceed. It found that the scheme was “(focused) on a small number of distinctive, culturally British games which have increasing difficulties to find private financing”.³¹ As part of the investigation, the territorial restriction (see above) was removed, and it was found that 25% of games produced in the UK would qualify.

III. ANALYSIS

Developing the insights set out above regarding the relationship between cultural and industrial justifications, the consequences of the Commission’s approval for the games industry can now be considered in more detail.

Some readers may find it surprising to see that, having succeeded in putting forward the cultural case, UK speakers immediately played it down. The Chancellor said:

This is a key industry of the future and I want Britain to be one of its biggest centres. 95% of UK video games companies in the UK are SMEs. This relief is one of the most generous in the world and will help them to grow, creating new jobs for hardworking people.³²

²⁸ Communication from the Commission on State aid for films and other audiovisual works [2013] OJ C 322 (see in particular paragraph 24 on application to games).

²⁹ SA.36139 ‘Video games tax relief’ [2013] OJ C 152 (30 May 2013) 8.

³⁰ See for example UKIE, ‘Ukie responds to announcement of European Commission tax breaks investigation’ (16 April 2013) <http://ukie.info/content/ukie-responds-announcement-european-commission-tax-breaks-investigation>; UKIE, ‘Ukie welcomes autumn statement announcements of support for business, urges government to push games production tax credits through’ (5 December 2013) <http://ukie.org.uk/content/ukie-welcomes-autumn-statement-announcements-support-business-urges-government-push-games-pr>.

³¹ European Commission, ‘State aid: Commission approves UK video games tax relief plan’ (IP/14/331), 27 March 2014

³² ‘Video games tax relief passes final hurdle’ (Press release, 27 March 2014) <https://www.gov.uk/government/news/video-games-tax-relief-passes-final-hurdle>.

Furthermore, the minister with responsibility for the creative industries added that “the government recognizes the important contribution the industry makes to the economy and is committed to supporting the industry’s continued growth through a range of measures like these new tax reliefs”.³³ The chief executive officer of industry body TIGA framed the successful campaign as one that will “create jobs, boost investment and enable the production of more British video games”.³⁴

These are remarkable statements in the context of what the European Commission was actually asked to approve. There is no mention of the word ‘culture’ until the final paragraph of the Government’s press statement, and that is only in the context of providing a link to the cultural test. The politicians are happy to touch upon partisan talking points (“hardworking people” is a current favourite of the largest party in the Coalition), and even to ignore the danger of the subsidy race (the very phrase that had scared the Commission in its first letter, “one of the most generous in the world”). The industry representative mentions jobs and investment and then Britishness (although with no specific mention of culture).

The continued growth of the industry is lauded in these statements. Of course, nothing forbids elected public or private representatives from praising industrial growth – indeed, “growth and jobs” is the core of the EU’s own strategy, and as noted above, article 107 does provide for some permissible state aid in respect of development. However, the disconnection between the scheme that is designed and defended as a cultural measure and the words (for domestic consumption, of course) of praise for what the Government’s subsidy will do *for the industry* is plain to see.

Despite the apparent lack of belief by government in its own cultural claims (or unwillingness to speak about such dangerous notions in public), there are plenty of reasons why games could and should be plausibly protected by article 107(3)(d), assuming the other aspects of the test could be met. Poole, a long-term observer of the sector, rightly criticises Apple’s distinction (in content regulation in its App Store) between games on one hand and books and songs (subject to less onerous regulation) on the other. Asking provocatively why Apple ‘hates video games so much’, Poole argues that all games contain some form of social or cultural comment³⁵ - indirectly reflecting Corliss’s earlier academic contention that ‘all games can be analyzed as sociocultural phenomena’.³⁶

In terms of a link between games and the nation, Chen’s mixed-methods study of Japanese culture in Taiwan found positive identification by heavy users with Japan, with the impact being best described as nation-building rather than nation-branding.³⁷ This research suggests that although a cynical observer of the UK government and UK-based games industry would suggest that the cultural test merely cloaks the desire for a subsidy to local industry, the focus of the test on promoting culturally British video games could actually be to the advantage of the UK and to ‘British culture’. Of course, some might understand the cultural dimension while still objecting to the need to frame that contribution in terms of national culture. However, the approach of the UK government appears to be one of sidelining a cultural vocabulary entirely. In our workshop,

³³ Ibid.

³⁴ Ibid.

³⁵ S Poole, ‘Why does Apple hate video games so much?’ *Edge* (June 2013) 32.

³⁶ J Corliss, ‘The social science study of video games’ (2011) 6 *Games and Culture* 3, 6.

³⁷ C-Y Chen, ‘Is the video game a cultural vehicle?’ (2013) 8 *Games and Culture* 408.

we observed a vibrant debate on the tension between ‘art’ and ‘business’ approaches in the games sector, with strong arguments being made that it was possible for these approaches to co-exist. The reluctance of the UK government to defend its own cultural test in cultural terms is therefore most surprising.

Indeed, the reassuring noises regarding the limited impact of the credit should not pass without comment. As it stands, this reflects a static model of the industry. However, a well-designed credit can surely have an impact of changing the behaviour of regulated actors. Great interest has been shown in the new UK system. For instance, a survey carried out for a game developers’ conference of ‘developers and industry professionals’ found that nearly half of those asked considered the UK scheme ‘the best in Europe’.³⁸ If this fairly reflects the views of developers, the Government should reasonably expect that its estimate would need to be revised upwards in due course.

SECTION B: CONSUMER LAW

I. CONTEXT

Games raise a number of distinctive issues under consumer law. I will consider two issues in this section. The initial question is the status of ‘digital content’ under consumer law.³⁹ The fundamental difficulty with digital content, which easily incorporates games, is that it does not obviously fall exclusively into one of the two conventional categories of consumer protection law – goods and services. There are of course features of games that point towards their categorization as goods – the one-off sale of a storage medium in a high street store. But there are also plenty of examples of games as a service – for instance, a monthly payment for participation in an online game. The other matter considered does not depend on the status of digital content, as its legal roots are separate from sales law. I assess the way in which the Unfair Commercial Practices Directive is being applied to the games sector, including the noteworthy intervention of the former Office of Fair Trading. The emerging law and practice on digital content and on in-app purchases demonstrates that with the success of emerging business models comes more intense regulatory attention.

II. DIGITAL CONTENT

Following the earlier articulation of digital content as a category in the Consumer Rights Directive (CRD) (which focuses on the provision of information and certain aspects of distance selling rather than sales law),⁴⁰ the UK proposed to add such a category to the substantive law on

³⁸ M Handrahan, ‘UK tax breaks voted the best in Europe’ (*GamesIndustry.biz* 8 July 2014)

<http://www.gamesindustry.biz/articles/2014-07-08-uk-tax-breaks-voted-the-best-in-europe>.

³⁹ See for example OECD, ‘Protecting and Empowering Consumers in the Purchase of Digital Content Products’ (OECD Digital Economy Papers No. 219, 2013) <http://dx.doi.org/10.1787/5k49czlc7wd3-en>; R Bradgate, ‘Consumer rights in digital products: A research report prepared for the UK Department for Business, Innovation and Skills’ (2010) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf.

⁴⁰ Directive 2011/83/EU on consumer rights [2011] OJ L 304/64.

the sale of goods and services, in a Consumer Rights Bill.⁴¹ The new category can broadly be categorized as a toned-down version of the prior requirements for goods.

Digital content is defined for the purposes of this legislation (in a definition taken from the CRD) as “data which are produced and supplied in digital form”.⁴² The legislation as drafted would only apply to digital content that is sold (for money, when bundled with other goods/content/services supplied for money, or paid for with something paid for with money e.g. purchased credits). However, a reserve power allows future Ministers to extend its application so as to avoid significant detriment to consumers – with it being argued in the explanatory notes that digital content supplied to a consumer in exchange for personal data could be covered under this route in future.⁴³ Because of the success of the ‘free’ aspect of free-to-play gaming, this possibility is a particularly significant form of potential regulation for games.

During the consultation that led to the Bill, a number of issues with the requirements for digital content were identified. As noted above, the long-established requirements for the sale of goods (of satisfactory quality, fitness for purpose, to be as described) would apply to digital content. However, sub-requirements on ‘appearance and finish’ were omitted.

The most difficult issue appeared to be the presumption, again long-established in respect of goods, that goods be free from minor defects.⁴⁴ Fears were expressed that this was an unrealistic expectation for games in particular, where minor defects (or to use the language of the sector, bugs) would be difficult to avoid entirely.⁴⁵ The responsible Department explained that the clause could not be omitted entirely, because that some forms of digital content (such as ebooks and digital audio or video) would be expected to be of high quality and indeed free from minor defects.⁴⁶ The House of Commons Committee sensibly pointed out that at the heart of the dispute was a lack of understanding or awareness that the requirement would be subject to a ‘reasonable expectation’ test, which was flexible enough to avoid the creation of new, unfair expectations on a matter such as bugs in games.⁴⁷

However, there are some potentially contentious issues that emerge out of the conciliatory language of the legislation’s promoters, the Department for Business, Innovation and Skills. In particular, the explanation of the flexibility raises more questions than it answers. In defending the non-application of the ‘appearance and finish’ requirement to digital content, the

⁴¹ (2013-4) HC Bill 161; (2014-15) HC Bill 3; (2014-15) HL Bill 29. As of 1 July 2014, the Bill has been carried over into the new session (2014-15), passed all stages in the House of Commons, and been given its second reading in the House of Lords. All references in this article are to the Bill as it was passed by the House of Commons. The provisions on digital content are found in chapter 3 (clauses 33-47) of the Bill.

⁴² Consumer Rights Bill, clause 2(9).

⁴³ Explanatory notes to Consumer Rights Bill (12 June 2013) [138]; Consumer Rights Bill, clause 33(5).

⁴⁴ Consumer Rights Bill, clause 34(3)(b); cf Sale of Goods Act 1979, s 14(2B)(c) (inserted by Sale and Supply of Goods Act 1994, s 1).

⁴⁵ Argument advanced by both UKIE (Ev w11-12) and BSA / The Software Alliance (Ev w23) in submissions to the Business, Innovation and Skills Committee of the House of Commons: House of Commons Business, Innovation and Skills Committee, *Draft Consumer Rights Bill* (2013-4) HC 697-III.

⁴⁶ Department for Business, Innovation and Skills, *Enhancing consumer confidence by clarifying consumer law: consultation on the supply of goods, services and digital content* (July 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf [7.111].

⁴⁷ House of Commons Business, Innovation and Skills Committee, *Draft Consumer Rights Bill* (2013-4) HC 697 [93-5].

Department contends that “the reasonable expectations of quality for a 69p app would not be as high as for one worth £5.99”.⁴⁸ This is in the abstract a fair point, and reflects the legislation (which refers to price),⁴⁹ although as markets develop (e.g. with some platforms being dominated by less expensive games) and willingness to pay up-front for a game changes, reasonableness will surely require a more subtle reading of consumer expectations than one based on (initial) price alone. Lovell argues that the current market for games is being transformed by wide variations in price points and a breaking of the link between value and cost.⁵⁰

In its discussion of satisfactory quality, the Department also explains that relevant circumstances “may include the type of digital content (e.g. a reasonable person may expect bugs in a complex new game on release, but not a more simple piece of software) or the way in which it is accessed (e.g. on a disk or downloaded from the Internet)”.⁵¹ The last of these points is particularly interesting. In so far as type is concerned, the intention is clear – the complex game could have (acceptable) bugs but not the simple game. However, the two forms of access are just noted without any (explicit) hierarchy – does download make bugs more acceptable or less acceptable? Beyond this, does it make a difference at all, as the online market grows and some high street game stores continue to struggle?⁵²

More broadly, the preference of some in the industry for always-online gaming should be noted. This is aptly described in *Edge* as, from a player’s perspective, “another in a long line of business models disguised as features”,⁵³ and subsequently linked twice in subsequent issues to public anxieties over cooperation between game platforms and the National Security Agency as part of the PRISM programme.⁵⁴

In the UK, the new approach to digital content has the potential to strengthen consumer protection across the game sector, removing in part the ‘advantage’ to the industry of service models over goods models and creating a clear set of consumer rights. The Consumer Rights Bill takes the priorities of the buyer of goods and offers similar protection to the buyer of digital content.

But of course, these consumers are players, and they might well set their own priorities differently if asked. The opportunity was not taken to consider whether players deserve greater legal protection against business models disguised as features – which, as we will see in the next section, are already coming up against other aspects of consumer law. Potential issues include the extensive rights reserved by operators to delete any content including user-generated content at any time,⁵⁵ requirements (linked with the questions of DRM discussed in part C) to maintain a

⁴⁸ (2013-4) HC 697 [89], discussing and extending Explanatory notes to Consumer Rights Bill (12 June 2013) [141]

⁴⁹ Consumer Rights Bill, clause 34(2)(a).

⁵⁰ Lovell, 89.

⁵¹ Explanatory notes to Consumer Rights Bill (12 June 2013) [141].

⁵² A Felsted, ‘UK high street closures accelerating’ (*Financial Times* 28 February 2013).

⁵³ —, ‘What’s the future for always-online gaming?’ *Edge* (May 2013) 97.

⁵⁴ —, ‘The power of the crowd’ *Edge* (November 2013) 10; N Brown, ‘Can Microsoft turn Xbox One around?’ *Edge* (May 2014) 62-69, 65.

⁵⁵ C Roquilly, ‘Control over virtual worlds by game companies: issues and recommendations’ (2011) 35 MIS Quarterly 653, 658 (85% of providers in sample include such a clause).

connection,⁵⁶ or restrictions on 'modding' that greatly constrain the ability of users to create new works even without any commercial purpose.⁵⁷

III. UNFAIR COMMERCIAL PRACTICES

European consumer rights law, implemented through regulations in the UK, also contains various prohibitions on unfair commercial practices (the UCP Directive).⁵⁸ Broadly, these prohibitions restrict the way in which products are marketed and sold, on the grounds that consumers rely on the information provided by retailers when choosing whether to participate in a market and when assessing value for money. As noted above, the Directive applies generally, without depending on the goods/services divide.

These provisions, while now in force in current form for near a decade, have recently become of great interest to the games industries. The former Office of Fair Trading (OFT) investigated and ultimately published detailed guidance on in-app purchases and the law. No new provisions were introduced; the OFT's focus was on giving examples of practices in this sector that would be likely or unlikely to violate existing legislation. We heard broad support for this approach at our industry workshop – there were primarily seen as the right thing to do, and good for the overall reputation of the industry, rather than as legal interference with the growth of the sector (as with aspects of intellectual property, as discussed in part III).

In-app purchases offer great opportunities to developers, and form a significant source of revenue,⁵⁹ but have not been without criticism. A whole plethora of ethical questions are raised by these developments,⁶⁰ particularly given the importance of (and exploitation of) 'psychological tricks' in the area of casual games,⁶¹ the share of overall revenue derived from a small proportion of players,⁶² and the suggestion that frequent, high-spending users ('whales') are targeted by some developers.⁶³ A major industry conference, Develop, now includes a 'psychology' track along with the more typical sessions on technology and business.⁶⁴

However, this should not be seen as a problem for casual games alone, for two reasons. The first is that these 'tricks' are often well-established tropes in gaming, which have admittedly not been

⁵⁶ I Steadman, 'SimCity's always-on DRM renders game 'unplayable', infuriates players' (*Wired UK* 8 March 2013) <http://www.wired.co.uk/news/archive/2013-03/08/simcity-5-players-petition-offline-mode>.

⁵⁷ H Postigo, 'Video Game Appropriation through Modifications : Attitudes Concerning Intellectual Property among Modders and Fans' (2008) 14 *Convergence* 59, 61.

⁵⁸ Directive 2005/29/EC [2005] OJ L 149.

⁵⁹ It was estimated that up to 90% of spending on mobile games is in the form of in-app purchases: S Dredge, 'Why Angry Birds are slightly miffed' (*Observer* 4 May 2014) 29.

⁶⁰ See detailed discussion, emphasising the variety of approaches among developers, reporting certain concerns that participation in F2P markets may be seen as inappropriate or harmful, and calling for the industry to avoid a binary approach to the issues, in T Phillips, 'Discussions with Developers: Free2Play and the Changing Landscape of Games Development' in M Willson & T Leaver (eds), *Social, casual, mobile: changing games* (forthcoming).

⁶¹ ___, 'Game developers have relied on psychological tricks for years to hold our attention - but are they in danger of losing their power?' *Edge* (November 2013) 78-83.

⁶² This is a key point in Lovell's argument. He highlights (at 68) the case of the German developer Bigpoint, with 130m users but raising 80% of income from 23,000 of them.

⁶³ M Rose, 'Chasing the whale: examining the ethics of free-to-play games' (*Gamasutra* 9 July 2013) http://www.gamasutra.com/view/feature/195806/chasing_the_whale_examining_the_.php?print=1

⁶⁴ <http://www.developconference.com/page.cfm/action=Press/libID=1/libEntryID=49/listID=2>

specifically monetised in console games (as opposed to arcade games) in the past. The second is that the established market for paid games is also seeing the development of in-app purchases – ‘paymium’.⁶⁵

The OFT’s initial intervention was the publication of a report and series of consultation questions, under the title “Children’s Online Games”.⁶⁶ This was the result of a market investigation, which had been announced in April 2013.⁶⁷ By the time its final report was published, the title had become “Principles for online and app-based games”.⁶⁸ This change in title was significant. While there are particular duties of care under the UCP Directive in respect of children (as a clearly identifiable vulnerable group of consumers), the OFT was surely recognising that much of its work was in respect of the general provisions of the Directive. The particular position of children was still reflected in the final document (and in public statements, such as that of the chair of the new authority, discussed below). The specific mention of app-based games made it clear that the target was not just games that are played online, but also included apps downloaded from an online store for (online or offline) use.

Problems in the market identified in the first report included price transparency, exploitation of children and exhorting them to buy or to ‘pester’ parents, and payments taken without express authorisation. The final report followed the same approach. The approach taken by the OFT was to set out the general principles of consumer law and apply them to the specific context of online and app-based games. Eight principles were promulgated in total – with a little more detail in the final version. The final version also included an important table mapping the principles onto the underlying legislation – which made it clear that the key legislation was the UCP Directive, albeit supported in some cases by the law on unfair contract terms and the (very basic) requirements of the E-Commerce Directive on the identification of service providers.

The first three principles required ‘clear, accurate, prominent and (...) up-front’ information in the following categories:

- Pricing information, including initial, subsequent and optional costs
- Material information (such as terms and conditions, main characteristics)
- Information about the provider (e.g. contact details in case of complaint)

The next set of principles pertained to the commercial aspects of online and app-based games. The OFT pointed out that commercial intent should be ‘clear and distinguishable’ from gameplay, and that creating a false impression that in-app payments are required (e.g. to continue to the next level) where they are not is prohibited. Principles 6 and 7 were specifically focused on the exploitation of children and on direct exhortation to children to buy.

The final principle addressed the controversial question of payment authority. The OFT recalled the difficulties of payments without the re-entering of a password, and set out the requirement for informed consent – which could allow a window (without password re-entry) if the

⁶⁵ ___, ‘The next-gen cash grab’ *Edge* (February 2014) 10-13, 10.

⁶⁶ OFT, ‘Children’s online games: report and consultation’ (September 2013) <https://assets.digital.cabinet-office.gov.uk/media/53330c4de5274a5660000005/oft1506.pdf>.

⁶⁷ OFT, ‘OFT investigates free children’s web and app-based games’ (press release, 12 April 2013) <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2013/33-13>.

⁶⁸ OFT, ‘The OFT’s Principles for online and app-based games’ (OFT1519, January 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf.

consumer actively chose to allow that.

The OFT contended that responsibility for these principles was divided across a number of parties. The 'information' principles could be supported by platform operators enabling and checking the provision of information, with significant involvement of 'games businesses' i.e. developers. The remaining principles were primarily for implementation by games businesses but with an expectation that platform operators would take action – for example, suspending or removing games where they become aware of a breach of the principles on children, and taking 'reasonable steps' to remove games where the payment authority principle is violated.

These valuable recommendations highlight a question of ongoing concern to the industry, and of good legal practices – that of the role of app store and platform operators. As the present author has argued elsewhere,⁶⁹ the relationship between developers and platform operators is capable of being abused, or co-opted as an alternative to direct state control of apps without due scrutiny, despite not obviously falling into a known category of regulatory oversight (e.g. dominant position under competition law, intermediary under broadcasting law). It is therefore important that the OFT's successor, the Competition and Markets Authority (CMA), not act in a way which further strengthens the power of the likes of Apple over independent developers. This would trade one set of problems (exploitation of vulnerable consumers) for a potentially serious problem in competition law.

The actions of responsible agencies should also be noted, because it is full of contradictions. On one hand, the OFT's work has been praised. The chair of the new CMA (successor to both the OFT and the Competition Commission) paid tribute to the guidelines, in a speech on his first day in office. He pointed to the phenomenon of children spending their parents' money, and how there was so much ignorance of consumer law "in a market with many developers and a few key industry players", adding that the resulting document was a model of how the CMA would make "online markets work well for consumers, businesses and the economy".⁷⁰

This last phrase explicitly draws upon the OFT's former mission and the CMA's own branding.⁷¹ However, the warm words mask a deprioritisation of work of this nature. In the run-up to the creation of the CMA, as part of the overall reform of the consumer 'landscape', the OFT's duty to enforce the underlying regulations had been changed to a power.⁷² The new power was then transferred to the CMA.⁷³ Local trading standards officers ('weights and measures authorities') had and continue to have a duty to enforce.

⁶⁹ D Mac Síthigh, 'App law within: rights and regulation in the smartphone age' (2013) 21 International Journal of Law & Information Technology 154.

⁷⁰ D Currie, 'EU consumers in the digital era' (speech, 1 April 2014)

<https://www.gov.uk/government/speeches/eu-consumers-in-the-digital-era>

⁷¹ Competition and Markets Authority, 'New competition authority to make markets work well for consumers, business and the economy' (1 April 2014) <https://www.gov.uk/government/news/new-competition-authority-to-make-markets-work-well-for-consumers-business-and-the-economy>.

⁷² See for example Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013/783, article 12, amending Consumer Protection from Unfair Trading Regulations 2008, regulation 19. Similar provisions apply to the enforcement of related legislation.

⁷³ Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) (No. 2) Order 2014/549.

Enforcement of consumer law will now, in general, be the function of these local authority trading standards officers, with the CMA only being involved in limited circumstances. The OFT had rightly recognised, in its enforcement guidelines, that Internet-related investigations demanded a particular level of national coordination and transnational cooperation.⁷⁴ The Public Accounts Committee was sceptical of the merits of relocating responsibility for enforcement to significantly under-resourced local authority staff.⁷⁵ It is indeed a paradox how, at a time when it is acknowledged that there is widespread ignorance of the law (and demonstrable evidence of harm), there is no longer a public authority with clear responsibility for work in this area. On the other hand, there is a new power for consumers to seek redress for breach of the relevant regulations (e.g. to unwind a contract that had been entered into with a prohibited practice being a significant factor in the decision to do so).⁷⁶ These are valuable protections of the individual gamer, but taken together, systemic attention may be less rather than more likely than before.

IV. SUMMARY

It can be concluded, in respect of consumer rights, that the impact of a range of legal provisions on game developers, and on the relationship between developers, players and others, is substantial. This reflects the success of the industry (which has brought it to the attention of responsible authorities), but also the changing business models. In some areas, the law has not changed – but it is more relevant than it was for one-off, over-the-counter transactions due to the nature of marketing and transactions. In other areas, the existence of a vibrant games sector is a factor in legislative reform – supporting through its very existence the case for the reopening of the old goods/services divide.

The relationship between law and ethics in respect of consumer protection is still being worked out. There is clear anger among players regarding some of the decisions made by platform operators and game developers, sometimes without a clear legal remedy. It is too soon to tell whether the OFT's guidance will have an impact on the worst practices in respect of in-app purchases, particularly when there are plenty within the industry who are prepared to defend these new models as innovative or even necessary.

SECTION C: INTELLECTUAL PROPERTY

Business models in the games industry are also influenced by intellectual property law. The degree to which particular approaches are protected by, or not protected by IP law is commercially significant. Understanding these influences is valuable in so far as it points to a less well understood aspect of state management of the industry. Appreciating the complexity of the relationship between games and intellectual property law can also inform IP reform projects, by (tentatively) identifying areas where reform would have particular consequences (desirable or undesirable) for the future of these business models. In this section, I will consider the influences

⁷⁴ OFT, 'Criminal Enforcement of the Consumer Protection from Unfair Trading Regulations 2008' OFT 1273 (September 2010) http://80.86.35.165/shared_ofi/policy/OFT1273.pdf [1.8]: "The OFT is most likely to be best placed to take enforcement action in cases where the unlawful practice/s causes or risks significant consumer detriment nationally" – and in a footnote, "as in the case of internet enforcement for example or where the source of the problem has no clear local connection".

⁷⁵ House of Commons Committee of Public Accounts, *Protecting consumers – the system for enforcing consumer law* (2010-12) HC 1468 (9 November 2011).

⁷⁶ Consumer Protection (Amendment) Regulations 2014/870.

of two aspects of IP law: technological protection measures, and the protection of different types of creativity.

A clear example of IP law underpinning a particular business model is technological protection measures (TPMs), including digital rights management (DRM). TPMs have been discussed at length in legal academic work on copyright.⁷⁷ Some entities within the video game sector (notably those who manufacture and promote hardware) are enthusiastic users of such measures.

The use of TPMs in relation to game hardware can be justified, in simple terms, as an anti-infringement measure. However, in Booton and MacCulloch's excoriating critique of TPMs, they suggested that the way in which they were used (with judicial approval) constituted the protection of dominant business models in the form of a de facto "console manufacturers' right".⁷⁸ The key form of TPM in this context is the so-called 'modchip', a term which is used to describe (normally) hardware enhancements that allow the playing of games on a console without the authorisation of the console manufacturer. In order to allow such playing to happen, the in-built restrictions (for instance, checking that a storage medium contains data supplied by the manufacturer to a developer for this purpose) need to be addressed in some way. These restrictions are defended by manufacturers as being necessary to prevent counterfeit games from being played (and so suppress demand for such games, in favour of legitimate channels). However, the implementation of TPMs often prevents other uses, such as 'homebrew' games developed outside of the typical industry structures, and allowing content from different markets or platform to be viewed on a given console.

Cases in the English courts have, in general, gone in favour of the console manufacturers (who have typically instigated the relevant civil actions). Use has been made of provisions in UK legislation transposing both the Software Directive and, in respect of non-software elements of games, the Information Society Directive. The latter is important because of more onerous sanctions (including criminal liability) and differently cast exceptions.

In practice, console manufacturers have emphasised the artistic elements of games (e.g. specific works of art in the form of game graphics) instead of focusing on the software code. Manufacturers have also argued that playing a game is a form of copying – on the grounds that images are copied from a storage medium into RAM or even, in later decisions, from the

⁷⁷ See for example P Holm, 'Piracy on the simulated seas: the computer games industry's non-legal approaches to fighting illegal downloads of games' (2014) 23 Information & Communications Technology Law 61 (on TPMs as an alternative to litigation); V Franz, 'Back to Balance: Limitations and Exceptions to Copyright' in G Krikorian & A Kapczynski, *Access to knowledge in the age of intellectual property* (Zone, 2010) (on the relationship between TPMs and balance in intellectual property); M Besek, 'Anti-Circumvention Laws and Copyright' (2004) 27 Columbia Journal of Law and the Arts 385 (on the lack of subtlety and decision-making in TPMs).

⁷⁸ D Booton and A MacCulloch, 'Liability for the circumvention of technological protection measures applied to videogames: lessons from the United Kingdom's experience' [2012] Journal of Business Law 165, 168, 186-7. See also Reimsbach-Kounatze & Wunsch-Vincent, 20 (arguing that revenue from royalties paid by game developers/publishers is the key source of income for console manufacturers, rather than income from the sale of consoles to users); N Daidj & T Isckia, 'Entering the Economic Models of Game Console Manufacturers' (2009) 73 Communications & Strategies 23-42 (characterising consoles as a two-sided market).

medium or console to the screen.⁷⁹

A recent decision of the Court of Justice of the European Union, however, suggests that the balance may be about to shift. The decision in *Nintendo v PC Box*,⁸⁰ in response to a preliminary reference from an Italian court, takes an approach which specifically includes proportionality as a limitation on the protection of the rightsholder. Specifically, the law will only protect TPMs against circumvention where the objective is to prevent infringing acts⁸¹ and where the circumvention device does not have a commercially significant other use.⁸² It seeks evidence of actual use of a device in breach of copyright (potentially a difficult issue),⁸³ and requires consideration of the effectiveness of measures and the relative costs of different forms of protection.

The decision must surely call into question aspects of the pro-console edifice erected over the years in the UK. For instance, the decision in *Playables* includes findings that the cause of action is a tort of strict liability,⁸⁴ and a statement that protection does not have to be totally effective.⁸⁵ The ruling is, for the purposes of this article, significant as a reminder of the value of copyright to certain aspects of the games industry. In particular, it is hard to characterise the console manufacturer as a rightsholder (as opposed to the beneficiary of a particular business model) in any meaningful way. As Booton and MacCulloch argued, manufacturers were never the intended beneficiaries of the TPM provisions of copyright law. Support for this view can be found in Lovell's contention that TPMs support a particular model of (one-off, comparatively high) payment for games.⁸⁶

Going one step further, it is also appropriate to wonder how different the industry would be if, for example, there were a wider barrier to the use of copyright law to achieve other goals. This was suggested in the US (games) decision of *MDY v Blizzard*, and national reviews of copyright law have also pointed to the need to avoid allowing the statutory rights of users to be overridden by agreement.⁸⁷

A different area where IP law influences the development of the industry is the status of games under copyright law. Copyright lawyers understand that what is promoted and known as a 'game' is, from the point of view of copyright law, a combination of computer code (a literary work subject to some specialized provisions), artistic works, and possibly other aspects including film and drama.⁸⁸ A report for the World Intellectual Property Organisation (WIPO) found that

⁷⁹ Noted in *Sony v Ball* [2004] EWHC 1739 [18] without deciding the point; confirmed in *R v Gilham* [2009] EWCA Crim 2293 [25].

⁸⁰ Case C-355/12.

⁸¹ Ibid [31].

⁸² Ibid [30].

⁸³ G Dickson, 'Game over for excessive TPM?' (2014) 24(6) *Computers & Law* 5, 7.

⁸⁴ [2010] EWHC 1932 (Ch)[19] (relying on and agreeing with Laddie J in *Sony v Ball* [2004] EWHC 1739.

⁸⁵ Ibid [17].

⁸⁶ Lovell 7.

⁸⁷ See for example the recommended changes to sections 2(10) and 374 Copyright and Related Rights Act 2000 in the report of the Copyright Review Committee (Ireland).

⁸⁸ S Stokes, *Art and copyright* (2nd edn Hart, 2012)180 (discussing how English law prohibits unauthorised copying of a film recording (rather than 'reshooting') and as such offers weak protection); Booton & MacCulloch 176 (on requirements for unity in dramatic works); P Gottlich, 'Online games from the standpoint of media and copyright law' *IRIS Plus* 56, 58-59 (on variation in games as film works across Europe).

there were two dominant approaches to the copyright status of video games: as predominantly computer programs or as mixed works.⁸⁹ A small minority of surveyed countries treated video games as audiovisual works. The inadequacies of this framework is highlighted in Lee's work, where she tentatively suggests the protection of 'gameplay',⁹⁰ which despite its importance to the identity and experience of games, is one of the less well protected aspects of the game.

One reading of recent cases would be that there are limits to what copyright law can offer those who develop video games. In the CJEU's *UsedSoft* decision (on the question of exhaustion), it appeared that the result would be the opening up of markets for second-hand games even where the original provider had purported to prevent this. In *SAS*, some scepticism is expressed regarding the protection of functionality under copyright law.⁹¹

However, such a reading would be an incomplete one. There is extensive 'tactical' use of the different manifestations of copyright (as discussed above regarding TPMs). This is also seen in other creative industries – such as the surprising significance placed on the 'Premier League Anthem'⁹² and on unexceptional Sky logos⁹³ in the cases on the showing of live football in pubs – protected works where the main attraction falls outside the scope of copyright law. The very nature of games as comprising both software and non-software elements therefore limits the impact of the CJEU's decisions.

Indeed, the Court's most recent intervention (in *PC Box*) supports a non-software analysis of games under copyright law. While confirming that the Software Directive only protects computer programmes, it added that video games "constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption". Therefore, it found that when graphics and sounds are part of the originality of a game, "they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29".

There may well be a more important mismatch between protection and expectation than the examples highlighted above. This is visible in the case of so-called 'cloning' of games – neither a new question⁹⁴ nor one without legal authority, but certainly a high-profile one in respect of current markets (especially smartphone app stores).⁹⁵

English law on the matter is reasonably clear. As discussed in this section, many aspects of games are clearly protected by copyright law. However, in the key case of *Nova Productions*,⁹⁶ a

⁸⁹ A Ramos and others, *The legal status of video games: comparative analysis in national approaches* (29 July 2013) [14].

⁹⁰ Lee, 872-3.

⁹¹ Case C-406/10 *SAS Institute v World Programming*.

⁹² Case C-403/08 *FA Premier League* [149]; *FA Premier League v QC Leisure* [2008] EWHC 1411 (Ch) [185], [207], [279].

⁹³ *British Sky Broadcasting v Avalonbar* [2014] CSOH 39.

⁹⁴ See for example S Sugar, 'Legal protection of video games' (1982) 1 International Media Law 22-3 (arguing, under 'imitations', that cases were pending and that an identical game and possibly a similar game would constitute infringement, based on artistic and musical works – but that in policy terms a game should be treated as a film and the software instructions as a script).

⁹⁵ Lee (at 866) highlights the low entry barriers to smartphone app markets as a factor in the recent prominence of allegations of cloning.

⁹⁶ [2007] EWCA Civ 219.

game similar to one already on the market was found not to breach the copyright of the developer of the 'original' – essentially on the grounds that no code had been copied and the similarity was essentially one of gameplay or the game mechanics. At European level, it is clear that a graphical user interface can be protected by copyright, but not if it is “differentiated only by (its) technical function” – a significant limitation.⁹⁷

In a workshop held as part of this research project, developers told us how the availability of clones within app stores was a significant source of concern and anger within the industry. However, identifying a suitable legal response was more difficult. We noted clear hostility to extending legal protection against cloning – perhaps influenced by the suspicion of the damage that the use and abuse of patents is said to have done in some sectors (e.g. mobile phone development) and how its application to software was resisted by many.⁹⁸ This is also found in response to those who would use trademark law to protect themselves against cloning,⁹⁹ and the ability of larger enterprises to stifle innovation through trademark litigation (where smaller parties are likely to settle rather than defend their actions) has been criticised.¹⁰⁰

There are some opportunities in the law of passing off. The recent decision in *Allen v Redshaw*, a decision of the then-Patents County Court¹⁰¹ on unauthorised t-shirts using images from the 1980s 'Button Moon' children's TV programme, demonstrates how a simple case can be brought in both copyright *and* passing off with the parties representing themselves.¹⁰² Passing off itself continues to develop, including important words on endorsement and merchandising in the image-related case of *Fenty v Arcadia*.¹⁰³ Nonetheless, satisfying the conventional passing off requirements of goodwill, misrepresentation and damage will still present a hurdle, especially in the case of games without significant user awareness.

Middle paths can be identified, including those who choose to licence rather than allege infringement.¹⁰⁴ However, this can still leave a gap in respect of situations where there is neither a plausible claim of copyright infringement nor a valid trademark. It also means that what is identified in developer circles as 'wrong' attracts limited legal remedies, while technical infringements of non-software works by supposedly copying them to a screen enjoys much more robust legal protection.

CONCLUSION

The most significant finding in this article is that the emerging business model of F2P non-console games is not handled as well as it should be, particularly as compared with other business models in the sector. For example, the design of the tax scheme appears to distinguish between revenue at the point of sale and revenue from subsequent purchases (as noted above),

⁹⁷ Case C-393/09 *Bezpečnostní softwarová asociace*; see also Stokes, 111.

⁹⁸ Lee has argued (at 868) that this concern can be addressed through balancing tests. However, there was little agreement among those we spoke to on what those tests should be.

⁹⁹ —, 'What happened to the iOS gaming revolution?' *Edge* (March 2014) 78-85, 80.

¹⁰⁰ —, 'Community matters' (*Edge* July 2014) 14 (discussing a dispute between Stoic and King; the latter is the developer responsible for the very successful *Candy Crush Saga*).

¹⁰¹ Now the Intellectual Property Enterprise Court.

¹⁰² [2013] EWPCC B1.

¹⁰³ [2013] EWHC 1945 (Ch).

¹⁰⁴ —, 'Lynch mob' *Edge* (Christmas 2013) 18 (referring to Square Enix).

and app developers have a rather different relationship with IP law than console manufacturers do. Consumer law has something to offer (with some justification), but the result is a great deal of attention in the consumer area and potential weaknesses in the others.

The three issues discussed in these pages demonstrate the complexity of the relationship between the state and the games industry. On one end of the spectrum, Government and industry are broadly on the same page, in support of giving favourable tax treatment to the business of game development, officially for the protection of British culture but, in the eyes of any reasonable observer, for rather different, economic reasons. The industry has successfully seen specific statutory provisions applied to it, for obvious financial advantage.

Conversely, intellectual property law plays an unclear (but still significant) role with respect to games. The problems identified in part C all concern aspects of IP law that could be termed 'bad fits' for the games sector –raising meaningful questions of legitimacy. It is hardly surprising that 'more law' is not a popular answer when copyright law as it stands has such trouble dealing with the relationship between software works and other works. The unpopular use of technological protection measures, and memories of overzealous enforcement and patent trolling, adds to this question of appropriateness and legitimacy.

The position of games under consumer law represents, for the time being, a middle position. Most of the laws considered in section B are of general application – they are often addressed to a technological or digital context, but not specifically games. The position of the games industries is recognised, instead, through means such as explaining how the concept of reasonableness will ensure that an appropriate test is set (in the case of substantive consumer rights in respect of sales), or through extensive research and guidance (in the case of unfair commercial practices).

This article has considered the impact of statute and related case law on the games industries in the UK. There is clearly a role for legislation in providing structures for good relationships between platform operators, developers and users. Along with the other findings of the research project of which it is a part, it has been demonstrated that the industry is being taken seriously by the organs of state, well beyond the traditional focus of content regulation. The complexity of this relationship, however, deserves more attention.